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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH EDWARD BUTLER, Defendant and Appellant.	E052573 (Super.Ct.No. SWF010105) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson, III, Judge. Affirmed in part; reversed in part with directions.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Joseph Edward Butler guilty of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury found true the allegation that defendant used a deadly or dangerous weapon during the commission of the murder. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) The trial court sentenced defendant to state prison for a determinate term of one year for the enhancement and an indeterminate term of 25 years to life for the murder conviction. The trial court described the total sentence as "26 years to life in state prison."

Defendant raises four contentions on appeal. First, defendant asserts his due process rights were violated when the trial court approved of the prosecutor characterizing the killing as murder during the cross-examination of defendant. Second, defendant contends the trial court abused its discretion by precluding defendant from testifying about his belief that the victim was a violent sexual offender. Third, defendant asserts the trial court violated his due process rights by precluding him from testifying about his belief that the victim was a violent sexual offender. Fourth, defendant contends the determinate abstract of judgment should be vacated, and the indeterminate abstract of judgment should be amended to reflect the award of presentence custody credit. We direct the trial court to modify the abstracts, but otherwise affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

In 2004, David Strain and Donna Boudreaux lived at The Outhouse RV Park in Lake Elsinore. In June 2004, defendant's uncle moved in next door to Strain and Boudreaux. Strain and defendant met at The Outhouse and became close friends. Around the time that Strain and defendant met, Strain also met Bret Baker; Baker occasionally stayed with Strain and Boudreaux. The victim met defendant and Strain at The Outhouse, around early or mid-August 2004. Strain, Boudreaux, Baker, defendant, and the victim were heavy drug users who injected methamphetamine.

Toward the end of August 2004, defendant moved into a home in the Lake Elsinore area with his wife (Jessica), his 15- or 16-year-old stepdaughter (J.), and his friend of 20 years, Dave Davis. Davis abused methamphetamine, via injecting the drug; however, Jessica and J. did not abuse the drug. Defendant, Jessica, J., and Davis lived in the main house on the property.

On the day defendant, Jessica, J., and Davis were moving into the house, the victim "came walking up out of nowhere, pushing a bicycle, offering to help [them] move-in." Defendant learned the victim had been a squatter at the Lake Elsinore house when the property was vacant—prior to defendant renting the property. The victim was homeless; defendant had a "soft heart towards" homeless people due to his own experience of being homeless, so defendant allowed the victim to stay at his house on different occasions. The victim would become paranoid when he consumed drugs, and he would walk around defendant's house holding weapons, such as steak knives.

Eventually the victim would "end up stealing stuff," then people at the house would tell him to leave. Defendant "didn't like" the victim; however, it was defendant who allowed the victim to stay at his house, and when the victim was at the house, the victim spent most of his time with defendant.

Shortly after defendant, Davis, Jessica, and J. moved into the house, Strain and Boudreaux moved their motor home into defendant's backyard—directly behind defendant's house. Baker helped Strain and Boudreaux set up their motor home in defendant's backyard. Baker agreed to do electrical work for defendant, and shortly thereafter Baker began living in defendant's basement in exchange for the work he performed. Strain received a $75,000 lump sum inheritance payment, which Boudreaux and Strain used when they needed money. Strain had the money and means to buy drugs when he wanted them, and defendant and Baker knew where to obtain drugs, so Strain financed the drugs for defendant and Baker when they purchased drugs.

Jessica had a job at Sam's Club, which caused her to be gone from the house at night. Defendant typically consumed drugs while Jessica was at work. Defendant consumed methamphetamines approximately two to five times per day, and his dosage increased over time. Over four or five months beginning in August 2004, defendant's personality changed, and he became more violent. For example, in prior years, when Davis and defendant argued, they only yelled at one another; over the approximately four months that Davis was living at defendant's house (from August to October or November 2004) their arguments became physical fights. At one point, defendant attempted to choke Davis when Davis interrupted defendant while defendant was

consoling J. over the loss of her cat. Defendant explained that, after the interruption, he "saw a tunnel [and] started pounding [Davis's] fucking head."

Baker saw defendant become "absolutely fucking loco on the shit." Defendant would "put spot lights outside . . . and sit out there at four in the morning with a hatchet, . . . listening to squirrels and stuff running around pretty sure that [the] whole military was out there looking for him." Defendant became paranoid about the victim. Defendant told Baker "that he thought maybe [the victim] was gonna do something to him first . . . ." Baker believed defendant was "getting real, real paranoid. . . . [H]e was doing a lot, a lot, a lot, of drugs chemically maxed out."

On a "couple" occasions, defendant told Boudreaux that he did not like the victim because he thought the victim was a thief. Strain and Baker also did not care for the victim; Strain believed the victim was a thief. Baker recalled an incident where it appeared the victim stole money from J. In describing the victim, Baker said, "He was just a real shady kind of a guy. I mean, stuff came up missing wherever he went." According to Baker, "[e]verybody hated [the victim]. He was a prick."

At times, the victim made inappropriate comments or gestures around J. In one incident, the victim referred to J. as "a hottie." Another time the victim made a sexual thrusting movement when J. came out of the shower and "shot off to her room in the house." In a third incident, the victim pretended to grab J.'s buttocks when she leaned over to type on a keyboard. Baker witnessed the foregoing incidents, and told defendant about them. Defendant appeared "discomforted" by the news, but "always acted like he had it under control." Baker thought defendant would "beat [the victim] up and make

him leave the property," but defendant and the victim continued "hanging out and being chummy."

Defendant obtained drugs from the victim. Baker assumed defendant let the victim come to the property "because of dope. The [victim] would only show up to either buy or sell or something like that and [defendant] was . . . pretty far off into the bag at that time . . . ." Baker described the victim as "a predator towards [J.]," and said the victim appeared to have a "predatory personality." Baker, Strain, and Boudreaux often discussed amongst themselves, whenever the victim was at the property, why defendant would allow the victim to be there since he was a thief and "kind of a jerk around [defendant's] stepdaughter."

There were times when defendant told Baker he wanted to harm or kill the victim. Around Halloween 2004, Defendant mentioned "using a knife [to kill the victim] but then said it would be too messy," defendant also mentioned strangling the victim. On one occasion, when Baker and defendant were speaking about the victim, defendant showed Baker a knife that was approximately a foot long, and said, "'Too messy, huh?'" Strain recalled four or five times when defendant said he wanted to kill the victim. Defendant was usually calm when he spoke about killing the victim, but defendant was "under the influence."

Also around Halloween 2004, defendant asked Baker "what a hot shot was." Baker explained that it was "an injection that doesn't have drugs in it. It has either acid or poison or something." A person gives another person a hot shot in order to kill the person. Defendant asked about using battery acid in a hot shot; Baker warned defendant

that battery acid could corrode the syringe. Defendant indicated he wanted to give the victim a hot shot because the victim "was a lop loser, son-of-a-bitch asshole predator son-of-a-biscuit." When defendant "babbled about the hotshot, he was kind of pissed off with [the victim] because way back when . . . whenever [the victim] was around, [defendant's] wife's stuff, his family's stuff would come up missing . . . ."

Defendant told Davis he wanted to kill the victim. Defendant said he had a bottle of insecticide and wanted to inject the poison into the victim. The conversation took place in Strain's motor home, and Strain and Baker may have been present during the conversation. Defendant had a one gallon jug of insecticide with him during the conversation; he had been carrying the jug around the property. Defendant wanted Davis to help him inject the poison into the victim. Davis told defendant, "[N]o, I don't want nothing to do with this."

The same day or night as the conversation, the victim arrived at defendant's home with a young man. Later that night, defendant told Baker he "fixed up two syringes for [the victim and the young man] for them to do"—"[o]ne hot shot and one real drug shot." Defendant appeared "[k]ind of jovial" when speaking to Baker about giving the victim the hot shot. However, the victim came to defendant's house the next morning "and he was still alive," he "didn't look sick." Defendant said, "[The victim] must not have done it, because he's still around."

Boudreaux recalled around Halloween 2004, defendant came to the motor home and asked if anyone had asked her about a hot shot. Defendant told Boudreaux that the young man who arrived with the victim took the hot shot and "got real sick." Davis and

Baker never again saw the young man who was with the victim that evening; Baker thought the young man may have died. Davis moved off of defendant's property shortly after the "hot shot" conversation, into his girlfriend's house.

Before Thanksgiving 2004, defendant went to the basement during the day, and spoke to Baker. Defendant said, "[T]onight is the night, so make sure the girls are gone." "The girls" referred to Baker's girlfriend and other female friends. During that conversation, defendant had "like a hatchet, a roofing hammer and a big hay hook" with him. Defendant began looking for places to hide the tools. Baker thought to himself, "[T]hese are not instruments you can just use a little bit to kick somebody's butt," so he left the property. Baker stayed with his girlfriend for a "couple days." A night or two before Thanksgiving 2004, around 10:00 p.m., Baker returned to defendant's property, in order to sleep. Baker appeared to be the only person at the property when he arrived. Baker was coming down from his high, so he slept very deeply.

The same night that Baker went to the house to sleep—a night or two before Thanksgiving 2004—the victim came to defendant's house in order to work on the alignment of the victim's girlfriend's car. The victim's girlfriend's car was a gold Ford Escort. The Escort was placed on blocks or stands, in order to remove two tires. Strain was in his motor home, but he could hear them "clanking around," working on the car.

That same night, Boudreaux was sleeping in the motor home when she heard noises that woke her. Boudreaux went to the kitchen area of the motor home, where there was a window, and heard a muffled voice say, "'please stop.'" It sounded as though the person's mouth was being covered. Boudreaux believed defendant was

fighting with his wife, but she could not determine if the voice was that of a man or woman. Boudreaux thought she might have seen the victim's face. Boudreaux heard a person "screaming for Jesus and his mama and for his life." Boudreaux heard the person say, "'Don't kill me. Please don't kill me.'" The screaming went on for minutes—a "[t]errifically long period of time . . . it wouldn't stop."

Strain heard a high-pitched scream, which he thought "sounded like a woman," so he believed defendant was fighting with Jessica. Defendant and his wife frequently argued, so Boudreaux asked Strain to check if Jessica was okay. Strain went outside and walked around the motor home. Strain saw defendant outside, on his knees, straddling a person. Strain believed defendant was straddling Jessica. Strain then reentered the motor home and told Boudreaux that defendant "had it under control." Boudreaux believed defendant was fighting with Jessica, and defendant "had it under control." Strain stayed in the motor home.

Approximately one hour later, around 4:00 a.m., defendant knocked on the door of the motor home, and Strain answered. Defendant said to Strain, "'You won't have to worry about [the victim] anymore.'" Since Strain had heard the high-pitched scream, he believed defendant was implying he killed the victim. Strain believed defendant killed the victim due to the victim stealing things.

At approximately 5:30 a.m., defendant again knocked on the door of the motor home. Defendant asked for help placing the victim's body in the trunk of the Escort. Strain went outside and saw a body under a blue tarp next to the motor home as well as

"a lot of blood" around the tarp. Strain picked up one end of the body and helped place it in the trunk with the tarp.

Around that same time, defendant went to the basement and woke Baker. Defendant told Baker he had "fucked up [the victim] and he's gone" and he needed Baker to help put tires on a car. Defendant had blood on his hands, and he seemed "excited" and "driven." Baker went outside. Baker put the tires back on the Escort, and Baker washed blood off the car with a garden hose. Defendant instructed Baker to paint a floor jack. Baker did not notice anything on the jack, but the handle, which was 18 to 24 inches long, was missing. Baker went to the basement to paint the jack. Inside the house, Baker saw defendant sitting down, he was "[k]ind of breathing heavily . . . not calming down." J. was in the house as well, and she "also seemed agitated or excited."

Baker and defendant went back outside. Defendant took the car keys and a wallet out of the victim's pockets. Baker went to the basement to find something to burn the wallet. When Baker went back outside, he suggested defendant and Strain dispose of the body while he stayed at the house and cleaned. While Baker and defendant were speaking, defendant "said he was going to say that he had caught [the victim] masturbating outside his daughter's bedroom door." Defendant said, "because he was on medication and that this was an infuriating act, that he reacted in rage and beat the guy and then just beat him too much and he died." Defendant concluded, "that way it would just be a manslaughter charge." Baker understood the masturbation story to be "the BS story," and that defendant had "taken care of [the victim] as according to

plan." Strain, Baker, and defendant agreed the account of the victim masturbating would be "the story."

Strain left with defendant, and they were gone for "a couple hours." Baker stayed behind and "started hosing down the blood." Baker found most of the blood next to the two tires. Baker also found a knit cap the victim used to wear; the cap was soaked in blood. Baker tried washing the blood from the cap, but eventually gave up due to the large amount of blood, and threw the cap away. Baker also burned the victim's wallet, and threw away the part that would not burn.

Strain followed defendant, driving defendant's car—a black Honda CRX. Defendant was not sure where he was going, but he mentioned Anza; he asked Strain to follow behind him and let him know if there was any blood dripping from the Escort. Eventually, defendant stopped at a location where he wanted to "dump" the victim's body. The location was in a canyon, off a dirt road, and along a steep hill.

Defendant broke the trunk key, so the body had to be pulled from the trunk through the back seat area; the back seats folded down to provide access to the trunk. Defendant threw the tarp and various other items from the car, such as a car seat, down the hill. Defendant had trouble pulling the victim's body from the trunk, so Strain helped defendant pull the body through to the passenger side of the car. Strain and defendant pushed the victim's body down the hill, but "it didn't go very far."

Defendant wanted the car and body disposed of separately because he believed "they would be connected together." Therefore, after dumping the body and various items from the car, defendant and Strain drove a little further up the road, approximately

one-eighth of a mile. Defendant poured gasoline on the Escort, but Strain convinced him not to set it on fire, because a fire could draw attention to the location of the car. Defendant and Strain pushed the Escort so it fell down the side of the hill.

After disposing of the body, car, and other property, defendant and Strain drove back to Lake Elsinore in defendant's Honda. Defendant told Strain he struck the victim, and "every time he hit him he thought, he would just think about what a useless piece of shit he was." Defendant said "it took a long time for [the victim] to die," and said he used a car jack handle to beat the victim.

After cleaning the crime scene, Baker spoke to Boudreaux, who appeared "more shaken than [he] had ever, ever seen her." Boudreaux told Baker about the screams she heard that night. Boudreaux said the screams were loud and lasted a "long" time. After speaking with Boudreaux, Baker "got the hell out of there."

Some time later, Baker returned to the property to retrieve his belongings. While at the property, Baker spoke to defendant. Baker asked defendant if the victim's death "was quick and painless." Defendant said, "It was long and terrible." Defendant said the victim was a "pussy" and that he "cried like a little bitch." Defendant "wished he would've at least tried to fight back . . . he was disgusted that the guy didn't even try to fight." Defendant told Baker he "had to go get bigger [tools], because he wouldn't die." Defendant explained that hitting the victim with a car jack handle did not kill him, so he began striking the victim with a car jack. Defendant appeared "revved up" and "without remorse" while describing the killing to Baker. Defendant told Baker, "[I]f I get caught, you know, I'm going to miss my wife for a couple years, but I had to do it dude . . . ."

Defendant explained, "I feel right about it because the guy was a predator to my daughter."

While Baker was at the property, he told defendant and Strain that he wanted "to make sure that we've got our story straight on this." Baker confirmed the story was that defendant caught the victim masturbating. Baker "knew the story was bullshit," but the three men agreed to "fabricate [their] lies to coordinate."

Around 11:00 or midnight on a night around Thanksgiving 2004, defendant and Strain went to visit Davis at Davis's girlfriend's home. Davis believed the visit may have occurred "a day or two" after the killing and disposal of the victim's body. Davis answered the door. Defendant spoke to Davis about seeing demons; Davis described the conversation as a "weird . . . drug conversation." Defendant told Davis that "he got rid" of the victim, and how the demons "are for real and he [had] really seen them." Defendant was "happy and excited" "glorifying how he bashed in [the victim's] face." Defendant smiled and laughed as he described grabbing a car jack and beating the victim's face.

On November 26, 2004, two men in a truck were driving from Hemet to Anza along Bautista Canyon Road, which is a treacherous, winding, dirt road. The men stopped to pick up a tarp they spotted along the road. When the men exited the truck to inspect the tarp, they found the victim's body. The men showed the body to a law enforcement officer. Riverside County Sheriff's Investigator Thomas Brewster saw "deep gashes" on the victim's head.

Law enforcement identified the victim, via fingerprints, on November 27—the day after the body was discovered. Also on November 27, 2004, Patricia Caldwell reported her gold Ford Escort stolen. Caldwell said that the last time she saw her car was when she loaned it to the victim.

On December 3, 2004, Investigator Brewster and Riverside County Sheriff's Sergeant Frank Taylor interviewed defendant at defendant's residence. Defendant told the officers he saw a newspaper article about the victim being found dead. Defendant described the victim as "a pain in the ass." Defendant then explained, "He was always wanting—he was always wanting something and never wanting to give, you know. I'd always try to encourage him, like, ['']Why don't you do something nice for my wife[?''] Like clean the bathroom or something like that to [show] your appreciation for the things we do . . . for you still. And he'd hem haw around[,] and he was like a little teenager sometimes you know. Like a pain in the ass teenager."

Investigator Brewster asked defendant who might kill the victim. Defendant stated he did not know because the victim "had a lot of drug[g]y-type connections." Defendant stated that the victim "pretty much used speed every day." Defendant hypothesized, "I just—the only thing I can figure is that maybe he had some deal go bad or something. Maybe he burned something bigger and tougher than any of us here."

Defendant was arrested on December 8, 2004. Riverside County Sheriff's Sergeant Jaime Alvarez searched defendant's home. Sergeant Alvarez did not see anything indicating that a violent crime occurred inside the house, or that anyone had

been bleeding or injured inside the house. There was also nothing significant found in the basement of the house.

Riverside County Sheriff's Investigator Benjamin Ramirez spoke to defendant on December 8, after defendant's arrest. Defendant told Investigator Ramirez that he had been diagnosed as bipolar, but had not taken his medication for six or seven years. Defendant denied harming the victim or having a physical altercation with the victim. When speaking to Investigator Ramirez, defendant referred to the victim as "a homeless piece of shit." Defendant explained that the last time he saw the victim, the victim came to defendant's house in a gold Ford. The victim asked defendant to check if there was anything wrong with the front end of the car. Defendant believed there was a problem with the car's tires. Defendant explained that he "was kind of in a pissed off mood when [the victim] showed up" because defendant and his "wife were having some words."

Investigator Ramirez told defendant he knew defendant killed the victim. Defendant explained that the victim was "stalking" J. Defendant said he used to find the victim sleeping just outside J.'s bedroom door. Defendant told the victim to stay away from J.'s bedroom, and the victim would apologize and say that he had "mental issues." Defendant said that on the night of the killing, defendant saw the victim masturbating outside J.'s open bedroom door. Defendant grabbed the victim by his shirt collar, pulled him through the kitchen, and then outside through the kitchen door. Once the victim and defendant were outside, the victim told defendant to "relax." Defendant told the victim, "'You're a sick mother fuck, man,'" and then "started whaling on him."

Defendant explained, "But the more I hit him [t]he more I wanted to hit and the more I wanted to hit him some more, and then I bashed his fucking head with my floor jack. I was disgusted. I, I was appalled and I was insane over my daughter." Defendant stated that at one point during the fight he laughed because the victim was trying to strike back at defendant, but the victim missed.

As defendant continued, he said, "I just started punching him out and, you know, he had his trunk open out there like he was gonna steal something. I took him out of his car. I slammed him in the trunk. I mean, it was just like [a] bar room brawl, you know." Defendant described slamming the trunk lid on the victim's head. Defendant explained that after hitting and strangling the victim, he "took a break," walked to a different area, "took a couple breaths," and then began striking the victim's head with a 20-pound floor jack. The victim began making noises, so defendant decided to move the victim to a different area in the backyard, so the neighbors would not be able to see what defendant was doing. Defendant wrapped a cable around the victim's neck and dragged him to an area near the motor home. As the victim lay on his chest, defendant struck the back of the victim's head five or six more times with the jack.

Defendant told Investigator Ramirez that after the killing, he told Jessica and J. what he had done. J. thanked defendant and told him there were several times she woke up in her bedroom to find the victim in the room staring at her. J. was afraid the victim was going to kill her. Defendant explained that if he did not kill the victim then J. would "be raped or dead by now." Defendant said, "I'm not Christ. I'm not a judge or a jury but, you know what, there was no way that you guys were gonna take him into

jail on this." Defendant said that he disposed of the body in Anza by pushing it "over that cliff."

Dr. Joseph Cohen is a Chief Forensic Pathologist for Riverside County. Dr. Cohen described the condition of the victim's body during the time of the autopsy. The victim suffered blunt force injuries. On the victim's head, Dr. Cohen found 50 different injuries: 24 abrasions, 18 contusions, and eight lacerations. The larger lacerations were on the back of the victim's head, where three deep lacerations went down to the bone or close to the bone. Internally, the victim suffered skull fractures, hemorrhages, and bruising on his brain. One of the fractures suffered by the victim was located at the base of the skull, where it would take a "significant force" to cause a fracture. The victim suffered four or five surface injuries on his neck, 18 blunt impact injuries on his torso, and 29 blunt impact injuries on his arms and legs. The injuries included abrasions, contusions, lacerations, and fractures. The neck injuries could have been caused by strangulation or being dragged by a noose.

Dr. Cohen identified the cause of the victim's death as blunt force trauma. Dr. Cohen believed the fatal injuries were confined to the victim's face and head, in particular, the lacerations on the back of the victim's head, the skull fractures, the brain hemorrhages, and the brain bruises. Dr. Cohen explained that a fracture at the base of the skull, which the victim suffered, could lead to death by causing a disruption in the body's electrical activity. Dr. Cohen stated that the methamphetamine found in the victim's system may have reduced the victim's "threshold for a terminal cardiac arrhythmia and death"; however, it did not cause or contribute to the victim's death.

B. DEFENSE

Defendant testified at trial. Defendant denied giving the victim a hot shot. Defendant denied ever speaking about killing the victim prior to the victim's death. Defendant allowed the victim to continue coming to his property because the victim supplied defendant with drugs. Approximately one week before the victim's death, over three different conversations, Baker told defendant about the victim's comments and actions related to J. Baker told defendant the victim made a thrusting motion towards J., he attempted to grab J.'s buttocks, and he called J. a "slut" under his breath. J. complained to defendant about the victim following her around the house. Defendant told the victim to leave the property and not return, approximately four days prior to the killing, but the victim returned at approximately 3:00 a.m. on the night of the killing in order to work on the victim's girlfriend's car. Defendant let the victim stay to work on the car.

Defendant went to the bathroom to take a shower, but then three or four minutes later decided to close the kitchen door, because he was suspicious of the victim. The kitchen door led outside, to the backyard. When defendant went to close the kitchen door, he found the victim masturbating in the open doorway of J.'s bedroom, while J. was in the room possibly sleeping. The victim was not attempting to attack J.; defendant did not see a weapon in the victim's possession. Defendant grabbed the victim and dragged him outside, with the intention of "beating" the victim, but without the intent of killing the victim. Defendant was "enraged" when he grabbed the victim. Defendant punched the victim when the two were outside; the victim fought back.

After a few punches, the victim ran away. The victim ran towards a car and reached into the trunk. Defendant "slammed" the trunk lid on the victim's head. During the fight, defendant was thinking about how the victim was trying to "'mess'" with J. The two men continued to fight—wrestling with one another. The victim ended up on the ground, on his back, while defendant sat on him, punching him. Defendant then grabbed the victim's T-shirt and used it to strangle the victim. The victim began gasping for air, so defendant relented. At that point, defendant had "a moment of clarity," where he thought to himself, "'Wow, this guy almost just now died.'"

Nevertheless, defendant's "anger kept building and building as [he] kept picturing in [his] mind [the victim] possibly raping [J.]." Defendant stood up as the victim was gasping for air. Defendant walked approximately 10 feet away from the victim. Defendant realized the neighbors might see or hear what was happening, so he walked back to the victim, wrapped a cable around the victim and dragged him over by the motor home. It took defendant "a couple minutes" to move the victim, but defendant did not calm down during that time.

Defendant began to have an "overwhelming feeling" of wanting to "destroy" the victim. Defendant thought to himself, "'I need to finish the job.'" At that point, defendant intended to kill the victim. Defendant proceeded to strike the victim's head with a floor jack three times, while the victim was facedown. At that point, J. came outside and asked defendant what was happening. Defendant told J. everything was okay and instructed her to go back into the house. Defendant covered the victim with a tarp in case J. went back outside. Defendant realized the victim was probably dead or

dying, which would cause defendant to go to prison, so defendant "immediately wanted to make it all go away."

Defendant admitted asking Strain and Baker to help him dispose of the victim's body, and other evidence. Defendant denied telling Strain and Baker a particular story they would all "go with" prior to leaving the house. However, defendant did recall saying, "'That motherfucker jacking off in front of my daughter.'" Defendant denied thinking of a legal defense or particular punishment at that point. Defendant did not know the difference between murder and manslaughter until he was in custody. Defendant was only feeling dread and paranoia as he began to realize he had killed a person. Defendant's rage towards the victim subsided hours after the killing.

A "day or two" after the killing, defendant spoke to Baker and told him what happened with the victim; he instructed Baker to tell people the truth, if anyone asked about the killing. Defendant initially lied to the police about the killing because he did not want to go to prison.

DISCUSSION

A. CHARACTERIZATION OF THE CRIME

1. *PROCEDURAL HISTORY*

During the cross-examination of defendant, the following exchange took place:

"[Prosecutor]: Is it a fair statement that as of the day you murdered [the victim]—

"[Defense Counsel]: I'm going to object to the characterization of 'murder.'

"The Court: Overruled. [¶] Continue.

"[Prosecutor]: As of the day—or prior to the day you murdered [the victim], you knew in your mind all the things he had done around your stepdaughter?

"[Defendant]: The day that I murdered [the victim]?

"[Prosecutor]: Yes.

"[Defendant]: The day that I murdered—yes, I did know."

Approximately three questions later, the following exchange occurred:

"[Prosecutor]: What day was it that you murdered [the victim]?

"[Defense Counsel]: Again, object to the characterization of 'murder.'

"The Court: I'm going to sustain the objection on that question that it's argumentative as phrased.

"[Prosecutor]: Do you recall the day you murdered [the victim]?

"[Defense Counsel]: I again object to the characterization of 'murder.'

"The Court: Overruled. [¶] You may answer that question.

"[Defendant]: I believe it was four days prior to Thanksgiving."

Later during the cross-examination, the following dialogue occurred:

"[Prosecutor]: It was your intention at that point to finish the murder of [the victim] off?

"[Defense Counsel]: I'm going to object to the characterization of 'murder.'

"The Court: Overruled. [¶] You can answer that.

"[Defendant]: I did.

"[Prosecutor]: And to do that, to finish off the murder, you got away from the body and walked over to, is it fair to say, the other side of your wife's car?

"[Defendant]: Probably to the front."

As the cross-examination continued, the following exchange occurred:

"[Prosecutor]: And at that point you realized you had murdered somebody?

"[Defendant]: Yes."

2. *DISCUSSION*

Defendant contends his due process rights were violated when the trial court permitted the prosecutor to characterize the killing as murder, because whether the killing was manslaughter or murder was a question for the jury. Defendant asserts the trial court's overruling of defense counsel's objections is the equivalent of the trial court making an improper judicial comment on the evidence. It is unclear from defendant's argument whether he is asserting only that an act of judicial misconduct denied him due process, or whether he is arguing that prosecutorial and judicial misconduct came together to create a denial of due process. For example, in defendant's opening brief, he asserts "the trial c[o]urt committed [an] egregious error," and the trial court's overruling of defense counsel's objections "amounted to an improper judicial comment on the legal issue at the heart of this litigation." However, in defendant's reply brief he uses the term "prosecutorial misconduct."

The People concede it was improper for the prosecutor to use the words "murder" and "murdered" while cross-examining defendant; thus, the People focus their argument on how the errors were harmless given the totality of the evidence. For the sake of thoroughness, we will assume defendant is asserting prosecutorial misconduct and judicial misconduct came together to create a denial of due process.

Typically, "[p]rosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 953.) However, our Supreme Court has concluded it is "improper for a prosecutor to use the term 'murder' in questioning a witness about an unadjudicated killing." (*People v. Price* (1991) 1 Cal.4th 324, 480.) Thus, defendant and the People have reasonably concluded that the prosecutor erred, since the prosecutor repeatedly referred to the killing as murder when questioning defendant.

We now turn to judicial misconduct. "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.] A trial court commits misconduct if it '"persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment[s] from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge."' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238.) However, "a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial [misconduct], especially when they are subject to review. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

In the instant case, defendant is asserting that the trial court's overruling of defense counsel's objections amounted to a comment on the evidence in favor of the prosecution. Defendant's argument for judicial misconduct is not persuasive because rulings against a party, even erroneous rulings, are not sufficient to establish judicial

misconduct. (*People v. Guerra, supra,* 37 Cal.4th at p. 1112.) Thus, we are not persuaded that the trial court committed misconduct.

Accordingly, since there was not judicial misconduct, we are left only with the prosecutor's error. "Under federal law, '"Improper remarks by a prosecutor can '"so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."'"' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) Defendant does not assert that prosecutorial misconduct alone was sufficient to create a due process error. Rather, he relies heavily, if not solely, on the trial court's error, in asserting a due process violation. Since we have concluded the trial court did not commit judicial misconduct, we find defendant's misconduct/due process contention to be unpersuasive.

Despite the foregoing conclusion, for the sake of thoroughness, we examine whether a misconduct/due process error would have been harmless. Assuming a federal due process error, we apply the *Chapman* standard to evaluate the prejudicial effect of the prosecutor's error. (*People v. Williams* (2009) 170 Cal.App.4th 587, 637-638 [Fourth Dist., Div. Two].) Under *Chapman,* we examine whether it can be concluded beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

"'"Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)" [Citation.] Generally, the intent to unlawfully kill constitutes malice. [Citations.] "But a defendant

who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances . . . .'"'" (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) One of those circumstances occurs "when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a))." (*Id.* at p. 549.)

"A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.]" (*Moye*, *supra*, 47 Cal.4th at p. 549.) "'"To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" [Citation.]' [Citation.]'" (*Ibid.*) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] '"However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ." [Citation.]' [Citation.]" (*Id.* at p. 550.)

When defendant testified, he described a fight in which he punched the victim, slammed the victim's head in a car trunk, and then strangled the victim, but the victim was still breathing. After strangling the victim, as the victim was gasping for air, defendant had "a moment of clarity," where he thought to himself, "'Wow, this guy

almost just now died.'" Defendant then stood, walked about 10 feet away from the victim, and thought about moving the victim so that the neighbors would not see or hear the struggle between defendant and the victim. It took defendant a "couple minutes" to move the victim, but after that defendant thought to himself, "'I need to finish the job,'" and defendant then had the intent to kill the victim.

Given defendant's testimony that he (1) had a "moment of clarity"; (2) thought about the need to hide his actions from the neighbors; and (3) took time to move the victim away from the neighbors' line of sight, defendant defeated the theory that he acted rashly and without deliberation and reflection, and from passion rather than from judgment. Defendant's account of murder—how he formed the intent to kill after a "moment of clarity"—reflects the antithesis of a heat of passion killing; rather, it reflects a killing that occurred due to judgment and deliberation. Defendant testified that his "anger kept building and building" as he fought the victim, but from defendant's testimony it appears he was angry and therefore consciously decided to kill the victim, as opposed to acting rashly and without deliberation. Accordingly, if there were an error, we conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict, because defendant's account of the killing reflects murder, not manslaughter.

B. SEXUAL OFFENDER EVIDENCE

1. *PROCEDURAL HISTORY*

On February 2, 2010, the prosecution filed pretrial motions. The prosecution sought to exclude any reference to the victim being a known or suspected sexual

offender. The prosecution argued the evidence should be excluded because (1) based on the prosecution's investigation the victim was never contacted, arrested, or convicted in a sex crimes case; and (2) defendant was fabricating the story about the victim being a sexual offender. The prosecution argued the evidence was more prejudicial than probative. (Evid. Code, § 352.) The prosecution asserted the evidence was not probative because there was no evidence indicating the victim was involved in a sex crime. The prosecution argued the evidence was prejudicial because the bad character evidence related to the victim would mislead the jury.

The trial court held a hearing on the prosecution's motions on February 2, 2010. At the hearing, defendant's trial counsel argued defendant heard "the victim had raped a woman so badly [he] put her in the hospital." The rape story had spread "through the community." Defense counsel argued that the truth of the rape story was not relevant, because this case centered on defendant's state of mind, so it only mattered if defendant believed the victim was a rapist. Defendant argued the evidence was probative because it "goes to one of the issues of state of mind and explains his reasoning for why he committed the crime or why he would have gotten enraged into that state." Defense counsel stated that, in addition to defendant, Strain and Baker[2] would testify that they heard the victim was a sexual offender.

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[2] Counsel stated that Strain and "Butler" (defendant) would also testify about hearing the rumor regarding the victim being a sexual offender; however, from the context of the statement, it appears counsel meant to refer to Baker, not defendant.

The trial court stated, "At this point, the Court feels that that is all self-serving hearsay, what [defendant] says, and would not be allowed. [¶] All the other witnesses, that is hearsay, because it is just speculation and would not be allowed." The parties and the trial court then discussed whether the tapes and transcripts of defendant's statements to law enforcement should be redacted to exclude defendant's statements about thinking the victim was a sexual offender.

As the discussion progressed, the trial court said if defendant testified at the trial, then defendant could explain his belief that the victim was a rapist. The trial court reasoned it would be appropriate to allow the evidence if defendant testified, because the prosecutor could cross-examine defendant and "get underneath the reasons" for defendant's belief "to see if they are valid for the trier of fact."

The prosecutor asked the trial court how he could cross-examine defendant about a lie. The prosecutor said, "But I can't—how can I cross him about something he has made up or is hearsay, and I have no way of doing it." The prosecutor argued, "[O]nce the jury hears there is a possibility that this victim was a rapist who put someone in the hospital, forget about it. [¶] They are going to say he deserved what came to him. [¶] I think that is what is unfair about this."

Defense counsel argued there was no evidence of the victim masturbating outside of J.'s bedroom, other than defendant's statements. Defense counsel argued that the prosecutor needed to cross-examine defendant about his beliefs, so that the prosecutor could argue "this is ridiculous and here is why." Defense counsel argued the lack of supporting evidence was an issue for the jury.

The trial court stated that the prosecutor could cross-examine defendant about the masturbation event, because defendant witnessed it; however, the prosecutor could not effectively cross-examine defendant about the rape, because defendant "just heard about it." The trial court stated, "the minute the trier of fact hears that this guy raped some woman and put her in the hospital, it would be very difficult for the Court to imagine doing anything other than patting him on the back."

The trial court pointed out there were no medical records, there was not a rape victim name, and there was not an incident report supporting the rape testimony. Thus, the trial court said, "[U]nder 352, I will exclude it. I am going to exclude it. Even if he testifies, he cannot bring it up. [¶] I am going to make that ruling without prejudice. If you come forward with information that this happened, and that he knew about it, then I think it is very probative, and then [the prosecutor] can delve into the details. The Court feels there is a big difference between someone getting on the stand and saying, you know what, I was in my house, I saw that fellow outside my daughter's window masturbating. Yeah, I can imagine that would drive somebody into a rage."

The following day, on February 3, 2010, defense counsel asked the trial court to revisit the motion related to the evidence of the victim being a rapist. Defense counsel argued the evidence was not self-serving hearsay, because the statements about defendant being a violent sexual offender were made prior to the killing. Defense counsel pointed out there were two witnesses who stated they heard the victim was a rapist prior to the victim's death, and that defendant knew the rape rumor prior to the victim's death.

The trial court stated that the clarification did not change the court's ruling, because the trial court "would still need to see some outside evidence that a rape occurred." The trial court stated the evidence of the earlier rape statements did not add any probative value to the evidence. Defense counsel argued that whether or not the rape actually occurred was not the issue; rather, the issue was what defendant believed—defendant's state of mind. The trial court stated it would reconsider its ruling if defendant offered some independent proof that the rape occurred.

Defense counsel argued the trial court's ruling was precluding part of defendant's defense, because it was excluding part of the evidence that led defendant to be so enraged. The trial court stated, "I tell you what, I agree with you . . . . There's no doubt that my ruling is going to prohibit you from bringing up a potential reason for why he flew into a rage and did this. [¶] I—we are on the same page, but I have to have some—and I understand how my ruling affects your presentation of your case. All I'm saying is, and if I'm wrong, then you know, hey, I invite you to take me up on a writ, and if we go, and I don't know what the outcome would be, but it comes back, then I find out I'm wrong. [¶] But I just don't believe so. I think there has to be some—something to substantiate the belief to allow the trier of fact to know that the victim in this case was a rapist. [¶] But no, I agree with you. Because I am concluding—you're right."

As the trial court continued, it explained that its ruling was still without prejudice, and if defendant could provide corroborating evidence that the rape occurred, then the court would revisit its ruling on the motion to exclude.

2. *DISCUSSION*

Defendant contends the trial court erred by excluding evidence of defendant's belief that the victim was a violent sexual offender. We disagree.

We review a trial court's decision to exclude evidence under Evidence Code section 352 for an abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.]" (*Id.* at p. 229.)

When a defendant seeks to present evidence of statements describing conduct that the defendant *believes* the victim has engaged in, then "the statement is not offered for its truth (thus not hearsay) but merely as circumstantial evidence of the [defendant's] mental state." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 390.) "Examples include, 'John keeps calling my house and hanging up when I answer,' or 'John keeps driving by my house at night, but when I get to the window, he's gone.' The statement[s] reflect[] a conclusion by the declarant which is manifestly unsupported by personal knowledge. However, if offered to prove the declarant's state of mind, the accuracy of the conclusion is irrelevant. If offered to prove a fearful state of mind of the declarant, what is important is not whether John actually engaged in the conduct, but that [the] declarant *believes* he did. Certainly, there remains the question whether the declarant honestly believes John engaged in the reported conduct. However, a jury could find the declarant honestly believed John had engaged in the conduct without necessarily finding that John had, in fact, done so. A clear limiting instruction can, in large part, dispel prejudicial misuse of such evidence." (*Ibid.*)

"A greater difficultly arises when the statement, fully asserting personal knowledge as opposed to mere belief, describes a past act of the [victim]. For instance, if a declarant says: 'John has beaten me many times,' the statement would be inadmissible to prove John committed the batteries. However, if the evidence is offered to prove the declarant feared John, and, as a result of this mental state would not have accompanied him, the statement only has the proffered evidentiary value if the declarant is truthful when describing the event. If the statement is a lie, it cannot constitute

circumstantial evidence of fear. In this situation, it is more difficult to fashion, and more demanding to expect the jury will follow, a limiting instruction. The jury can only legitimately conclude the declarant feared John if the statement is truthful. However, the jury would have been instructed not to consider the statement itself as true, because it is not admitted for its truth, but only as circumstantial evidence of state of mind. The difficulty is compounded the more inflammatory the prior conduct." (*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 390.)

The evidence in this case falls between the foregoing two examples. On one hand, the evidence is similar to the first example, because defendant was not present during the alleged rape, and thus did not have firsthand knowledge of the crime, which would make the evidence more akin to a belief. On the other hand, the nature of the rumor implies that there is a person with personal knowledge of the victim committing a sexual offense, which makes the evidence less like a belief. When defendant claims that he heard a rumor the victim raped a woman, and therefore defendant was angry at the victim for being near J., defendant is asserting that there is some truth to the rumor—some cause to believe the victim is a rapist. The jury needs to understand that belief, in order to understand if defendant was truly in a murderous rage.

In order for the jury to evaluate the rumor and defendant's understanding of the rumor, there would have needed to be a mini-trial regarding the rape allegations against the victim. For the jury to believe defendant became murderously enraged at the victim, due in part to the rumor, the jury would need to evaluate more than just the fact that the rumor existed. The jury would need to understand how defendant heard the rumor, any

details to the rumor, who spoke about the rumor, in what context was the rumor discussed with defendant. The trial court could reasonably conclude a "mini-trial" about a violent sexual act, on the part of the victim, would have distracted and inflamed the jury.

Thus, while the rumor evidence was probative, in that it could be used as circumstantial evidence of defendant's state of mind, the trial court could reasonably conclude it was overwhelmingly prejudicial, because it would be distracting and inflammatory. The evidence would be distracting because it would necessitate a mini-trial on the rumored allegations against the victim, as set forth *ante*. (See *People v. Castain* (1981) 122 Cal.App.3d 138, 143 [mini-trials can be distracting].) The evidence of the rape rumor would be inflammatory, in part, because it involved a rape by the victim, while the crime in the case involved a murder by the defendant. The two crimes were not similar in nature, and they involved different perpetrators of crimes. Further, the victim was likely never punished for the alleged crime, which supposedly required a hospital stay by the alleged rape victim. Accordingly, the trial court could reasonably conclude that the rape rumor evidence would likely have inflamed the jury because (1) the rape and murder were different crimes with different perpetrators, (2) the victim was likely never punished for the alleged rape, and (3) the rape could be viewed as extremely brutal, given that the victim stayed in a hospital. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [considering similarity and punishment when discussing inflammatory nature of propensity evidence].) In sum, the trial court's ruling was

within reason, because the rape rumor evidence can be viewed as more prejudicial than probative.

Defendant asserts that the evidence would not have been more prejudicial than probative because defendant only planned to present evidence that the victim *might* be a rapist—defendant was not going to definitively refer to the victim as a rapist. Defendant argues that such evidence is highly relevant in a case that centers on provocation and defendant's state of mind. We agree with defendant that the evidence would have probative value. However, the probative value of the evidence was diminished by the amount of statements admitted at trial referring to the victim as a "predator." For example, Baker described the victim as "a predator towards [J.]," and said the victim appeared to have a "predatory personality." Further, Baker testified that after the killing, defendant said, "I feel right about it because the guy was a predator to my daughter." Thus, while the rape rumor evidence was probative, it was not the sole available evidence regarding the victim possibly having a propensity to commit sex crimes.

Additionally, the evidence was prejudicial, as set forth *ante*—it involved a crime different than that charged, and a crime committed by a different perpetrator. There also would have likely needed to be a mini-trial on defendant's understanding of the rape rumor. Thus, even though defendant did not plan to definitively refer to the victim as a rapist, the trial court could reasonably conclude the probative value of the evidence was outweighed by its prejudicial effect.

Nevertheless, to the extent the trial court may have erred, we conclude the error was harmless. We determine whether an error was harmless under the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.) As explained *ante*, defendant testified that he fought the victim, then had a moment of clarity, took time to reflect on the location of the killing, and then formed the intent to the kill the victim. Given defendant's testimony, the killing occurred due to judgment and deliberation. Accordingly, if the trial court erred, the error would be harmless, because it is not reasonably probable the jury would have reached a verdict more favorable to defendant, given that defendant's own description of the killing described murder, rather than manslaughter. (See *Moye*, *supra*, 47 Cal.4th at p. 549 [Manslaughter involves a person acting "rashly and without deliberation and reflection, and from such passion rather than from judgment." Internal citations & quotations omitted.].)

C. DUE PROCESS

Defendant asserts the trial court violated his due process rights by precluding him from testifying about his belief the victim was a violent sex offender, because defendant was prevented from comprehensively testifying in his own defense. We disagree.

"'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. In *Chambers v. Mississippi* [(1973) 410 U.S. 284], it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due process requirements.'" (*People v. Babbitt* (1988) 45

Cal.3d 660, 684.) However, the court clarified that a defendant does not have "'a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.' [Citations.]" (*Id.* at pp. 684-685.) Thus, the exclusion "of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The evidence of the rape rumor was probative in that it helped bolster defendant's theory of the case—that he killed the victim while enraged over the victim masturbating near J.'s open bedroom doorway. However, defendant's trial was not fundamentally unfair, because the trial included a variety of evidence indicating the victim perhaps had a deviant sexual interest in J. For example, Baker described the victim as "a predator towards [J.]," and said the victim appeared to have a "predatory personality."

Baker also testified that the victim made inappropriate comments or gestures around J., and went on to describe the victim's actions. In one incident, the victim referred to J. as "a hottie." Another time the victim made a sexual thrusting movement when J. came out of the shower and "shot off to her room in the house." In a third incident, the victim pretended to grab J.'s buttocks when she leaned over to type on a keyboard. Baker said he witnessed the foregoing incidents, and told defendant about them.

When defendant testified, he stated that Baker told him about the various incidents between the victim and J. approximately one week before the victim's death, during three different conversations. According to defendant, Baker told defendant the victim made a thrusting motion towards J., he attempted to grab J.'s buttocks, and he called J. a "slut" under his breath. Further, defendant testified that he caught the victim masturbating outside J.'s open bedroom doorway, while J. was in the room possibly sleeping. Davis testified that defendant told him the victim acted strange around J. Davis also recalled telling police that defendant said he thought the victim might "do something" to J. Defendant told Investigator Ramirez that if he did not kill the victim then J. would "be raped or dead by now."

Given the variety of evidence presented by both the prosecution and the defense related to (1) the victim's sexual comments about J., (2) the victim's sexual actions towards J., (3) J.'s age being 15 or 16, (4) defendant's knowledge of the victim's comments and actions, and (5) Baker's opinion the victim was a predator, due process was not violated by the exclusion of the rape rumor evidence. The rape rumor evidence would have added to defendant's theory of the case; however, it was not significant evidence, especially when the excluded evidence was a rumor, and the sexual evidence that was included at trial partially consisted of events that were witnessed firsthand. In sum, the rape rumor did not have significant probative value, such that its exclusion rendered the trial fundamentally unfair, because several accounts of the victim's alleged deviant sexual interest in J. were presented at trial, which permitted defendant to argue that he was passionately enraged at the time of the killing.

Despite our conclusion that the trial court did not violate defendant's right to due process, we will examine the harmless error portion of defendant's argument. Since the contention implicates a federal constitutional right, we must examine whether the error would have been harmless beyond a reasonable doubt. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 924.) As explained *ante*, defendant described how the murder occurred, and his thoughts and feelings during the killing. Defendant said that after strangling the victim, while the victim was gasping for air, defendant had a moment of clarity where he was able to reflect on what he was doing. Defendant then thought about moving the victim to a location where the neighbors would be less likely to witness the events, and he took the time to move the victim. Defendant testified that he then formed the intent to kill the victim. Defendant's description of his thought process does not reflect the state of mind necessary for a manslaughter finding, because defendant decided to kill the victim as a result of judgment and deliberation. (See *Moye*, *supra*, 47 Cal.4th at pp. 549-550 [Manslaughter involves a person acting "'rashly and without deliberation and reflection, and from such passion rather than from judgment.'"].) While the rape rumor evidence might have helped to explain why defendant was initially angry enough to physically harm the victim, it would not negate the fact that defendant stated he had a moment of clarity after the initial physical altercation, or that defendant deliberated over where to conduct the killing. Therefore, given the evidence in this case—defendant's testimony in particular—we conclude beyond a reasonable doubt a verdict more favorable to defendant would not have been rendered if the rape rumor evidence had been admitted.

D. ABSTRACTS OF JUDGMENT

1. *PROCEDURAL HISTORY*

When the trial court pronounced defendant's sentence it said, "The defendant is therefore sentenced to state prison for the indeterminate term of 25 years to life. He is sentenced to an additional one year because of his conviction for the weapons enhancement pursuant to Penal Code Section 12022(b)(1) for a total term of 26 years to life in state prison. [¶] And I'm showing here he has credits of 1,970 days."

Defendant's indeterminate abstract of judgment reflects a sentence of 25 years to life for the murder conviction and a one-year term for the associated enhancement. Defendant's determinate abstract of judgment reflects a 25-year term for the murder conviction and a one-year term for the associated enhancement. The determinate abstract also reflects a credit of 1,970 days.

2. *DISCUSSION*

Defendant contends (1) the determinate abstract of judgment should be vacated because defendant was not sentenced to a determinate term, and (2) the indeterminate abstract of judgment should be amended to reflect the award of presentence custody credit. The People support defendant's argument. We disagree with the specifics of the contention, but agree that the abstracts must be corrected.

A punishment for first degree murder is an indeterminate term of 25 years to life. (§ 190.) In 2004, the relevant weapon enhancement provided, "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year . . . ." (Former § 12022, subd. (b)(1).)

Appellate courts have authority to order the correction of abstracts of judgment if the abstracts do not accurately reflect the oral judgments of sentencing. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

"When a defendant is sentenced to both a determinate and an indeterminate sentence, the determinate sentence is served first. Nonetheless, neither term is 'principal' or 'subordinate.' They are to be considered and calculated independently of one another. [Citation.]" (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856; see also *People v. Dotson* (1997) 16 Cal.4th 547, 553-560 [discussing determinate terms for enhancements].) Further, no part of the determinate term may be credited towards the defendant's eligibility for parole. (*In re Maes* (2010) 185 Cal.App.4th 1094, 1100.)

The murder sentence is indeterminate, and therefore should be listed on the indeterminate abstract, but not on the determinate abstract. The enhancement sentence is determinate, and therefore should be listed on the determinate abstract, but not on the indeterminate abstract. We appreciate that the trial court was trying to be thorough by listing both offenses on both forms, but we are concerned that the combination of offenses on both forms will lead to confusion as the years progress. Thus, we direct the trial court to correct the abstracts of judgment.

The indeterminate abstract should be corrected to (1) delete the enhancement from box number 2; and (2) check box number 7, indicating an "[a]dditional determinate term." The determinate abstract of judgment should be corrected to (1) check the number 1 box, indicating "Additional counts are listed on attachment"; (2) delete the murder conviction from the determinate form; and (3) adjust the total time in the number 8 box to reflect one year.

In regard to the credit for time served, the determinate and indeterminate abstracts should reference one another as attachments. Thus, in the "credit for time served" area on the indeterminate abstract, the trial court may add a note directing the reader to see the determinate abstract.

The People and defendant argue that the determinate abstract should be vacated because defendant was not sentenced to a determinate term. We disagree with the parties' interpretation of defendant's sentence. A one-year prison sentence under former section 12022, subdivision (b)(1) is a determinate term because it is set for a fixed time period. (See *In re Maes*, *supra*, 185 Cal.App.4th at pp. 1099-1100 [Discussing attaching determinate enhancement sentences to indeterminate felony sentences.].)

DISPOSITION

The trial court is directed to modify the abstracts of judgment as follows: The indeterminate abstract should be corrected to (1) delete the enhancement from box number 2; and (2) check box number 7, indicating an "[a]dditional determinate term." The determinate abstract of judgment should be corrected to (1) check the number 1

box, indicating "Additional counts are listed on attachment"; (2) delete the murder conviction from the determinate form; and (3) adjust the total time in the number 8 box to reflect one year. In the "credit for time served" area on the indeterminate abstract, the trial court may add a note directing the reader to see the determinate abstract. The trial court is directed to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.